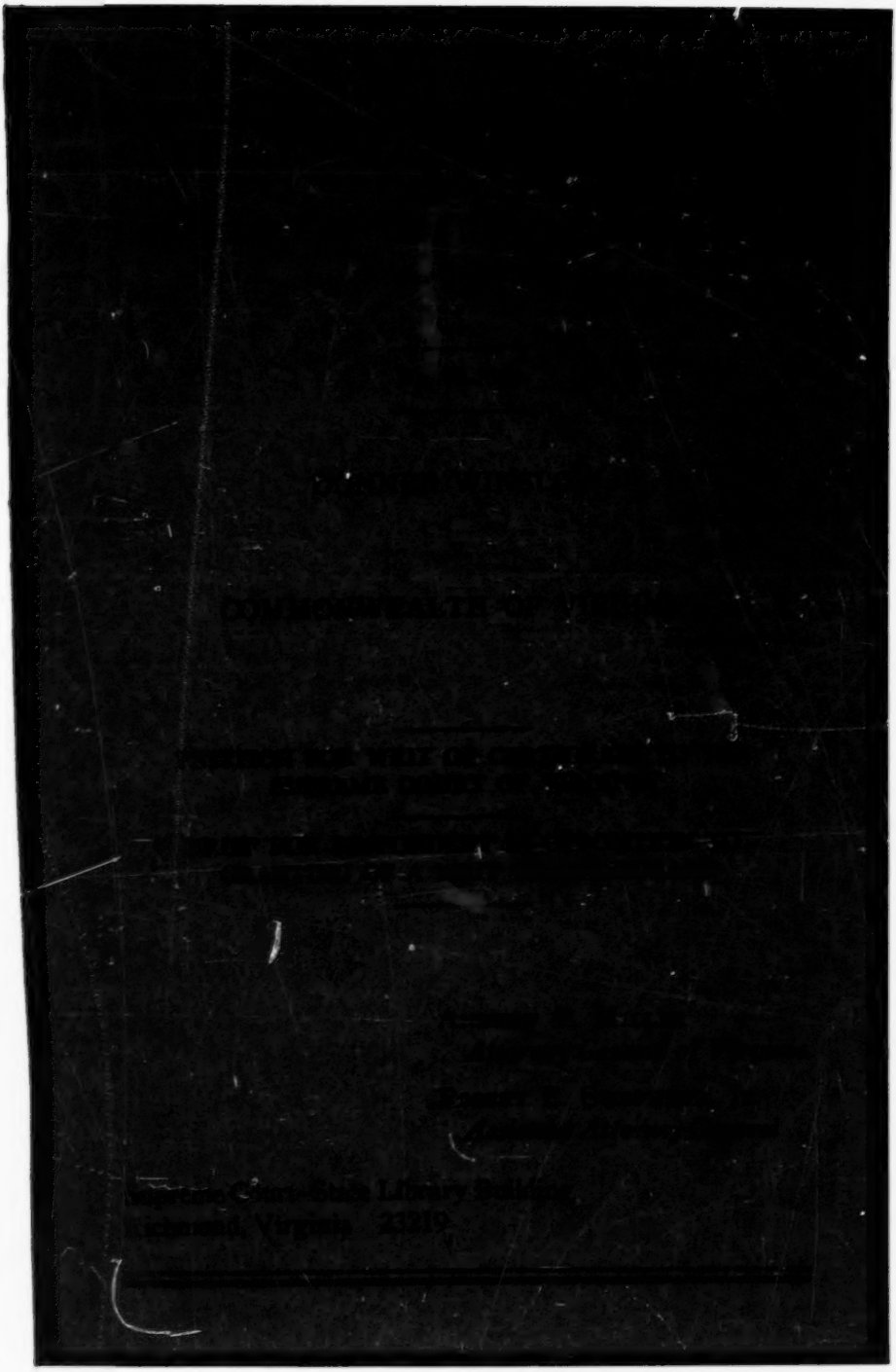

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1548

DONNER WINSLOW,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on January 14, 1974, not be granted.

OPINION BELOW

The opinion of the Supreme Court of Virginia is not reported but is set forth as Appendix "B" to the Petition for Writ of Certiorari at page 2A. This opinion was issued after briefs were filed with the Court subsequent to this

Honorable Court granting a Writ of Certiorari vacating a prior judgment of the Supreme Court of Virginia of October 17, 1972, and remanding the case to the Supreme Court of Virginia. The prior opinion of the Supreme Court of Virginia is similarly unreported and may be found in Appendix "A" to the Petition for a Writ of Certiorari at page 1A. The decision of the Supreme Court of Virginia of January 14, 1974, was based on the decision handed down on the same day in *Price* v. *Commonwealth*, 214 Va. 490, 201 S.E.2d 798 (1974) (The *Price* case is also pending before this Honorable Court as Case No. 73-1477).

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Is the Commonwealth of Virginia obscenity Code § 18.0-228 void for vagueness and overbreadth in violation of Petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States by virtue of the decision of this Court on June 21, 1973 in *Miller* v. *California, et al.*?

2. Are the publications involved herein obscene in the constitutional sense and thus not protected expression under the First and Fourteenth Amendments to the Constitution of the United States, as the same was applicable during the period of time covered by the conduct charged against Petitioner?

3. Can the various United States Supreme Court rulings on obscenity promulgated on June 21, 1973 and June 25,

1973 effecting a substantial decisional change in the application of constitutional principles be applied retroactively to Petitioner in the case at Bar for conduct occurring prior to these decisions and, is the application of such a statute to said Petitioner void as *ex post facto* legislation by virtue of Article I, Sections Nine and Ten of the United States Constitution and the Due Process laws of the Fifth and Fourteenth Amendments?

4. Does utilization of a purely local contemporary community standard versus a statewide contemporary community standard violate Petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger: nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Constitution of the United States:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 18.1-227, Code of Virginia (1950), as amended:

> § 18.1-227. *"Obscene" defined.*—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.

Section 18.1-228, Code of Virginia (1950), as amended:

> § 18.1-228. *Production, publication, sale, possession, etc., of obscene items.*—Every person who knowingly:
>
> (1) Prepares any obscene item for the purposes of sale or distribution; or
>
> (2) Prints, copies, manufactures, produces, or reproduces any obscene item for purposes of sale or distribution; or
>
> (3) Publishes, sells, rents, lends, transports in intrastate commerce, or distributes or exhibits any obscene item, or offers to do any of these things; or
>
> (4) Has in his possession with intent to sell, rent, lend, transport, or distribute any obscene item, shall be

guilty of a misdemeanor. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another.

STATEMENT OF THE CASE

The defendant was indicted and convicted in the Corporation Court of the City of Norfolk, Virginia, on March 13, 1972, of selling and distributing a movie film and a magazine in violation of § 18.1-228, Code of Virginia (1950), as amended. On December 22, 1971, Officer Robert E. Vest, Norfolk, Virginia Police Department, while acting on orders of his superiors, entered the Adult Book Store at 159 Granby Street, Norfolk, Virginia, in order to purchase a book and a film from that store. The defendant was the clerk on duty at the time. Officer Vest purchased a motion picture film, which was not identified by name, and a magazine entitled "Cinema Sex" (T. 39-40).

Officer Vest made his selection of the magazine from an assortment of magazines which were displayed all around the walls of the store, and the magazine was in a plastic wrapper so that the contents inside could not be seen before purchase. After selecting the magazine, he asked the defendant if he had any films, and was advised that the only films for sale were the ones that were in a glass case in a counter. Officer Vest picked out a film and asked what was in the film. On each box containing film, there was a photograph in black and white from the film, and Officer Vest asked the defendant if that was what was in

the film, and the defendant said that the picture on the box indicated the contents of the film. Officer Vest then purchased the film from the defendant for a total of $10.35. Because the magazine was sealed in plastic, Officer Vest was unable to observe the contents of the magazine prior to purchase; therefore, he asked the defendant if the defendant knew what was in the magazine. The defendant responded that he did not know what was in the magazine and had not seen the contents. However, the seal on the magazine was of clear plastic, and therefore, the pictures on the front and back of the magazine could be seen by a prospective purchaser or anyone else (T. 40, 42, 43, 44). It was later shown that the magazine as a whole was similar to the pictures on the front and back covers.

After the magazine and the film box were introduced into evidence and the film shown to the jury, the rest of the testimony at the trial was in the nature of expert testimony by both prosecution and defense witnesses.

Mr. Sam T. Barfield, the Commissioner of Revenue for the City of Norfolk, who had served in that position since 1970 and before then had served as a City Councilman for over nine years, testified on behalf of the Commonwealth. He testified that over a period of time he had delivered between 145 and 150 speeches to various civic groups and other organizations in the Norfolk area on the subject of pornography and obscenity. During the course of these speeches and other appearances, he had occasion to discuss the question of obscenity with between 10,000 and 20,000 people in Norfolk who represented the entire spectrum of the community (T. 75-76). After extensive cross-examination as to his qualifications, he was duly certified by the trial court as an expert on contemporary community standards for the City of Norfolk (T. 113, 114, 115). He then testified that he had examined both the film and the maga-

zine in question prior to trial, and that in accordance with the relevant legal tests, the items in question fell short as to every element of the tests for obscenity previously set forth by this Court (T. 118-122).

The Reverend Herbert Hugh Smith, Jr., an Episcopal priest at the Church of the Advent in Norfolk, who had been at that church since May of 1965, and had been in the City of Norfolk since 1960, then testified as a witness for the Commonwealth. He testified that over the years he had had many opportunities to discuss the issue of pornography and obscenity, both in informal discussions and "bull sessions," and also with organized groups. Over the last five years in particular, he stated that it had been a more pronounced subject of interest in the community. He testified that he had talked with over 1,000 people in the City of Norfolk on the subject and that these people represented all walks of life in the City, as well as all geographical areas. He further testified that he had previously testified as an expert on local contemporary community standards relating to the description or representation of sexual matters (T. 181-184). After extensive cross-examination, he was also duly qualified by the trial court as an expert on contemporary community standards in the City of Norfolk relating to obscenity. (T. 205, 206).

Reverend Smith then testified as to the film and magazine in question "that the dominant theme of the material taken as a whole appeals to a prurient interest in sex and that it is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual maters," and that it is utterly without redeeming social value.

James V. Card, a professor of English at Old Dominion University, testified as to his past experience dealing with obscenity and pornography. The majority of that testimony

related to experiences and instruction that he had had in the matter. He testified that he had discussed the matter with some 500 or 600 persons, most of whom were from the academic community. He further stated that they would not be from all walks of life in the community. The trial court allowed him to testify as an expert on obscenity, but not on community standards (T. 406). He testified that both the film and the magazine did not appeal to the prurient interest in sex, that is, a shameful or morbid interest in sex to the average adult. He further felt that both the film and the magazine had some redeeming social value, mainly because they showed sexual practices that were instructional to someone who had not seen them before (T. 412-414). However, he also admitted that no matter what was put on film, or no matter what was printed, that it will have some redeeming social value to someone who has not seen it before simply because it would be instructive to that person (T. 415, 416). He also stated that he had never seen a film or magazine that he considered to be obscene (T. 418, 419).

The defendant also called as an expert witness the Reverend Carl Esewein, who is the minister of the Norfolk Unitarian Church, and had been in Norfolk for a period of six years. He had had extensive discussions with people in Norfolk regarding the questions of pornography and obcenity and estimated that he had discussed the issue with thousands of people in Norfolk from various walks of life and various backgrounds. He was then qualified by the court as an expert witness on contemporary community standards (T. 435). He testified that in his opinion the film in question did not violate the standard of appealing to the prurient interest and that it was not utterly without redeeming social value. He stated that he did not have an opinion as to whether the material was patently offensive

because it affronted contemporary community standards relating to the description or representation of sexual matters. He testified to the same effect as to the magazine (T. 445, 446).

The defendant also presented as an expert witness Dr. Lawrence Donner, an associate professor at the University of Maryland School of Medicine in Baltimore, Maryland. Although he was allowed by the Court to testify as an expert on obscenity, he was not allowed to testify as to contemporary community standards. The evidence showed that the first time he had ever been in Norfolk, Virginia, was when he arrived the day before the trial in order to testify for the defendant. During that period of time he was in Norfolk, he had spoken to approximately six people on the subject of obscenity, and they were all persons he spoke to immediately before the trial outside the courtroom. It was on this basis that the trial court would not certify him as an expert on contemporary community standards. His testimony was substantially identical to that of the other two witnesses for the defendant.

The defendant also called Mr. Stan Fedyszyn, who is the artistic director of the Norfolk Theatre Center, and who testified that a large part of his work dealt with matters of obscenity and pornography in Virginia. He was allowed to testify as an expert on contemporary community standards of the City of Norfolk and the metropolitan Tidewater area (T. 481, 482). His testimony on direct examination was just the opposite of the testimony of Mr. Barfield referred to above. However, he also testified that he had never seen a film that was utterly without redeeming social value, nor had he ever seen a magazine that was uterly without redeeming social value (T. 484-485).

Also called by the defendant was Dr. Robert Athanasiou, a certified psychologist and an assistant professor at Johns

Hopkins University in Baltimore, Maryland. Because of his limited contact with the City of Norfolk and his total lack of any experience in dealing with the people in Norfolk, Dr. Anthanasiou was allowed to testify as an expert on the subject matter of obscenity, but not as to the contemporary community standards (T. 499). His testimony was the same as the other witnesses for the defendant. The defendant also called as a witness Dean Burgess, the assistant director of the Portsmouth, Virginia Public Library. He was allowed to testify as an expert both on the matter of obscenity and on the matter of contemporary community standards. His testimony was identical with the other witnesses for the defendant.

ARGUMENT

I.

The Virginia Obscenity Statutes Involved In The Prosecution Herein, As Construed By The Supreme Court Of Virginia Both Prior To The Instant Case And In The Case Of Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798 (1974), Are Constitutional As Applied To Materials Depicting Or Describing Sexual Conduct As In This Case.

In the initial decision in *Price* v. *Commonwealth,* 213 Va. 113, 189 S.E.2d 324 (1972), the Supreme Court of Virginia described the obscenity test to be utilized in Virginia in the following terms:

> "As more recent decisions of the Supreme Court have reflected divergent opinions which failed to gain majority approval we have felt constrained to follow the definition of obscenity set forth in *Roth,* 354 U.S. at 489, 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' *Roth* has been reaffirmed in *United States* v.

Reidel, 402 U.S.351 (1971). We have also acquiesced in the following amplification of the *Roth* definition set forth in a plurality opinion in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'* v. *Massachusetts*, 383 U.S. 413, 418 (1966);

> '. . . [T]hree elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'

House v. *Commonwealth*, 210 Va. 121, 125, 169 S.E. 2d 572, 575 (1969). See *Hearn* v. *Short*, 327 F. Supp. 33, 36 (S.D. Tex. 1971) (Concurring opinion of Bue, J.)." (213 Va. at 115).

This exposition of the test for obscenity in Virginia in the *House* and *Price* cases amounts to a judicial construction of the definition of obscenity contained in § 18.1-227 of the Code of Virginia (1950), as amended, so as to preserve the constitutional viability of that Statute (See *Grove Press Inc.* v. *Evans*, 306 F. Supp. 1084, 1086 (E.D. Va. 1969)). It is unquestioned that up until the decisions of this Honorable Court in June of 1973, this was the test for obscenity approved by Your Honors. The essential question then becomes whether the decisions in *Miller* v. *California*, 413 U.S. 15 (1973); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973); *Kaplan* v. *California*, 413 U.S. 115 (1973); *United States* v. *12 200-Ft. Reels of Super 8-mm Film*, 413 U.S. 123 (1973); *United States* v. *Orito*, 413 U.S. 139 (1973); *Heller* v. *New York*, 413 U.S. 483 (1973); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Alexander* v. *Virginia*, 413 U.S. 836 (1973), so drastically changed the state of the

law as to make the test applied to this case in the Corporation Court for the City of Norfolk, Virginia, constitutionally deficient.

It may be useful at this point to quote a lengthy portion of Chief Justice Burger's opinion for this Court in *Miller, supra,* to set forth the parameters of valid constitutional enforcement of obscenity laws:

> "The basic guidelines for the trier of fact must be:
>
> *(a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois* v. *Wisconsin, supra,* 408 U.S., at 230, 33 L.Ed.2d 312 (1972), quoting *Roth* v. *United States, supra,* 354 U.S., at 489, 1 L.Ed.2d 1498 (1957), *(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,* and *(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.* We do not adopt as a constitutional standard the *'utterly* without redeeming social value' test of *Memoirs* v. *Massachusetts, supra,* 383 U.S., at 419, 16 L.Ed.2d 1 (1966); that concept has never commanded the adherence of more than three Justices at one time. . . . If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary [citations omitted].
>
> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, supra:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

"Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection. [citations omitted] . . . ." (413 U.S. at .....; emphasis supplied.)

It is evident that the tests newly articulated by Your Honors in *Miller* differ from the tests described by the Supreme Court of Virginia in the *House* case and in its initial decision in the *Price* case in only two respects. The first of these is a substitution of the terminology as to whether the work, "taken as a whole, lacks seriously literary, artistic, political or scientific value" as opposed to the standard described by the Supreme Court of Virginia as a plurality determination in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413 (1966), that the work must be "utterly without redeeming social value." This substitution, contrary to the argument made by petitioner in this proceeding, is not of constitutional dimensions. In *Miller*, Your Honors did not hold the "utterly without redeeming social value" test to be unconstitutional but you merely recognized the obvious fact that it was practicably unworkable, and a more rational test was substituted therefor. The new test is far less restrictive than the earlier *Memoirs* test and imposes a lighter burden on the prosecu-

tion. The second change made by Your Honors in *Miller* was to explicitly limit the application of these tests to materials which depict or describe "in a patently offensive way, sexual conduct specifically defined by the applicable state law." The second alteration is not actually a change in the test but is merely a clearer delineation of the type of materials to which the test may be applied.

Applying the *Miller* standards to the instant case, it is clear, first, that the magazine "Cinema Sex" and the untitled motion picture film are clearly lacking in "serious literary, artistic, political, or scientific value" since the jury in the Corporation Court for the City of Norfolk and the Supreme Court of Virginia both found that the material was "utterly without redeeming social value," a much harsher standard. Second, did the materials in question in this depict or describe "in a patently offensive way, sexual conduct"? The Supreme Court of Virginia in its decision on remand by this Honorable Court obviously resolved that question against the petitioner herein.

The only remaining question, then, is whether the Supreme Court of Virginia properly applied the *Miller* tests, if in fact they were substantially new tests, to this conviction which preceded the *Miller* decision. First, as previously pointed out, the only newness in the test is a change regarding the social value of the materials in question and that change is to the detriment of the petitioner here. The judgment affirmed by the Supreme Court of Virginia in its initial decision was predicated on a test that created a much more extensive burden for the Commonwealth than does the *Miller* test with regard to "social values." Thus, this petitioner had the benefit of a more restrictive test and has no standing to complain with regard to this change (See *Price* v. *Commonwealth*, *supra*, 214 Va. at 494). The other variation was not in the test but in the description of the

materials to which the tests could be constitutionally applied and the Supreme Court of Virginia obviously in its second decision considered the materials herein in light of the *Miller* test.

Several courts have, on remand, dealt with the problem of applying *Miller* to prior convictions. The overwhelming majority of those courts have reaffirmed pre-*Miller* convictions on grounds similar to those enunciated by the Supreme Court of Virginia (*United States* v. *Thevis*, 484 F.2d 1149 (5th Cir. 1973); *Gibbs* v. *State*, ... Ark. ....., 504 S.W.2d 719 (1974); *People* v. *Euskat*, 109 Cal. Rptr. 433 (Calif. Ct. App. 1973); *Rhodes* v. *State*, 283 So.2d 351 (Fla. 1973); *Slaton* v. *Paris Adult Theater*, ... Ga. ....., 201 S.E.2d 456 (1973); *Hall* v. *Commonwealth*, 505 S.W.2d 166 (Ky. 1974); *Ebert* v. *Maryland State Board of Censors*, 19 Md. App. 300, 313 A.2d 536 (1973); *Commonwealth* v. *Claflin*, 298 N.E.2d 888 (Mass. App. 1973); *State* v. *Bird*, ... Mo. ....., 499 S.W.2d 780 (1973); *People* v. *Heller*, 33 N.Y.2d 314, 307 N.E.2d 805 (1974); *State* v. *Bryant*, 20 N.C. App. 223, 201 S.E.2d 211 (1973); *Keating* v. *Vixen*, 35 Os.2d 215, 201 N.E.2d 880 (1973); *State* v. *Watkins*, ... S.C. ....., ... S.E.2d ..... (1973); *State* v. *J-R Distributors, Inc.*, 82 Wash.2d 584, 512 P.2d 1049 (1973)). Thus, it is respectfully submitted that the Supreme Court of Virginia correctly ruled that the Virginia obscenity statute, as construed by them, was constitutional, and that it was properly applied to the magazine and motion picture film in the instant case so as to affirm the judgment of conviction.

II.

As Pointed Out Above, The Supreme Court Of Virginia Did Not Retroactively Apply The More Restrictive Aspects Of The Miller Test To The Petitioner But Instead Gave Petitioner The Benefit Of The Most Favorable Aspects Of The Pre-Miller And Post-Miller Tests In Reconsidering His Conviction And There Was Consequently No Ex Post Facto Legislation Against The Petitioner. Price v. Commonwealth, Supra.

III.

The Supreme Court Of Virginia Properly Has Ruled That The Appropriate Community Standard To Be Applied In An Obscenity Case Is A Local Community Standard As Opposed To A State-Wide Or National Community Standard.

In its initial decision in the case of *Price* v. *Commonwealth, supra*, the Supreme Court of Virginia made the following statement:

> "Price's assignment of error to the lower court's ruling that the contemporary standard in issue was that of the local community rather than that of the national or state-wide community has been resolved against him by *Alexander* v. *Commonwealth*, 212 Va. 554, 186 S.E.2d 43 (1972). There, noting that the Supreme Court had not been able to agree on a definition of the community by whose standards obscenity should be measured, we approved the local community standard" (213 Va. at 115)

Upon the remand of the *Price* case, the Supreme Court of Virginia again considered the contention that the community was a national or state-wide community and the Court reiterated its prior view in the following terms:

> "*Miller* and *Paris Adult Theatre I* support our holding in *Price*, following *Alexander* v. *Commonwealth*, 212 Va. 554, 186 S.E.2d 43 (1972), that the com-

munity standard to be applied is that of the locality rather than that of the state or nation. Although *Miller* had no occasion to consider whether the use of local standards was constitutionally permissible, it held that national standards were not constitutionally required and that state standards were constitutionally acceptable. In reaching this result the court noted that the diversity of our nation would prevent the effective formulation of a national standard of obscenity, 413 U.S. at 30. The court also relied on the Anglo-American tradition of allowing lay jurors to draw upon the standards of their community. *Id.*

The reasons given in *Miller* for holding that national standards are not constitutionally required in obscenity cases compel the same conclusion with respect to statewide standards. It would be difficult, if not impossible, for a Virginia jury to formulate a statewide standard of obscenity, for our state comprises communities with a vast diversity of life styles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities. Moreover, Virginia juries have traditionally relied on local rather than statewide community standards. *See, e.g., Easterling* v. *Walton*, 208 Va. 214, 218, 156 S.E.2d 787, 790 (1967), which restated the rule that a jury must apply local community standards in medical malpractice cases.

In *Paris Adult Theatre I* the Supreme Court rejected the contention that expert evidence of obscenity is required when the motion picture or other material is placed in evidence, 413 U.S. at 56, a ruling that we had anticipated in *Price*. This ruling reinforces our conclusion that local community standards may be applied, for expert testimony would be required to establish statewide standards. *See Miller*, 413 U.S. at 31." (214 Va. at 491-492).

As the Supreme Court of Virginia stated, the decision of this Honorable Court in *Miller* would appear to support the Supreme Court of Virginia's contention when Your Honors stated the following:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." (413 U.S. at ....).

Your Honors also appear to approve a local community standard when you recognized that "[t]he adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions has historically permitted triers-of-fact to draw on the standards of their community. . . ." (413 U.S. at .....). This language would clearly appear to approve a local standard and its respectfully submitted that the Supreme Court of Virginia's description of the appropriate community is correct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 21st day of June, 1974, I mailed three copies of the foregoing Brief for the Respondent in Opposition to the Granting of a Petition for a Writ of Certiorari to Robert Eugene Smith, Esquire, and Gilbert H. Deitch, Esquire, Suite 2005, 100 Colony Square, Atlanta, Georgia 30361, and to Robert Epstein, Esquire, 318 Holiday Inn Scope, Norfolk, Virginia, counsel of record for petitioner.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General